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Department of Homeland Security
of Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE*
*425 Eye Street N.W.*
*BCIS, AAO, 20 Mass, 3/F*
*Washington, D.C. 20536*

[redacted]

FILE [redacted] Office: Miami Date: MAY 13 2003

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting District Director, Miami, Florida. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion will be granted, and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Saint Christopher (St. Kitts) and Nevis who was admitted to the United States on April 30, 1992, as a nonimmigrant visitor with authorization to remain until October 29, 1992. The applicant remained longer than authorized without applying for or receiving an extension of temporary stay. She remained unlawfully present from April 1, 1997, until April 8, 1999, when she filed an application for adjustment of status. The applicant was issued an advance parole document on September 2, 1999, and departed the United States.

The acting district director determined that the applicant's departure with advance parole triggered her inadmissibility when she returned to the United States in parole status on September 12, 1999. The acting district director found the applicant to be inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than 180 days but less than 1 year. The applicant is the beneficiary of an approved Petition for Alien Relative filed by her naturalized U.S. citizen brother. The applicant seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The acting district director concluded that the applicant had failed to establish she had a qualifying relative and denied the application accordingly.

The AAO determined that the applicant had been unlawfully present for more than one year and was inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The AAO affirmed the acting district director's decision and dismissed the appeal accordingly.

On motion, counsel revisits the same issues that he presented on appeal, including that the applicant was not inadmissible, she did not again seek admission into the United States in connection with her parole, she was not properly advised that she may be found inadmissible due to her departure, and she did not knowingly waive her rights in connection with her departure. Counsel states that the applicant was not seeking admission, but was paroled into the United States. Counsel discusses the Service's November 26, 1997, memorandum which clearly states that an alien's departure after accruing unlawful presence will trigger their inadmissibility even though they have been granted advance parole. Counsel also states that the AAO did not address the argument that the applicant is eligible for nunc pro tunc permission to reapply and/or continue her application.

Section 212(a)(9)(B) of the Act provides, in pertinent part, that:

> (i) Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States, whether or not pursuant to section 244(e), prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or
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> > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure from the United States, is inadmissible.
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> (v) The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. She is ineligible for a waiver of that ground of inadmissibility under section 212(a)(9)(B)(v) of the Act because she has no qualifying relatives.

Counsel's arguments on motion are not persuasive. The applicant is, in fact, *again* applying for admission. Her first admission was her initial entry as a visitor in 1992. Her application for adjustment, not her parole, is her second application for admission. As her application for adjustment had not been adjudicated prior to her departure, she was still considered applying for admission, thus, her departure triggered the unlawful presence and her inadmissibility.

Counsel's assertion that that applicant was not advised of the consequences of departing with advance parole is not supported by the record. On September 1, 1999, the day before her advance parole document was issued, the applicant signed a notice that clearly stated that she may be found inadmissible if she had been unlawfully present in the United States for more than 180 days after April 1, 1997.

[redacted]

Counsel's argument that the applicant is eligible for nunc pro tunc consideration is contrary to established law. In *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991), the Board of Immigration Appeals found that the Service has no authority to grant an application for adjustment of status on a nunc pro tunc basis. An applicant "must be eligible, at the time [the] application is acted on, for the preference category relied on when the application was filed." Id. at 337. The applicant in this case, was not eligible at the time the application was acted on.

As the applicant has no qualifying relative, she is not eligible for a waiver of inadmissibility.

In proceedings for application for waiver of grounds of inadmissibility the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here the applicant has not met that burden. As such, the previous decision dismissing the appeal is affirmed.

**ORDER:** The order of October 7, 2002, dismissing the appeal is affirmed.